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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 275.

LAWRENCE DYER,
Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,
Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLEES' BRIEF.

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Appeal from the Supreme Court of the State of Wisconsin.

APPELLEES' BRIEF.

OPINION OF THE COURTS BELOW.

The opinion of the Supreme Court of the State of Wisconsin (R. 26030) is reported in 250 Wis. 613, 27 N. W. (2d) 733; the opinion of the Circuit Court for Rock County is not officially reported, but is found in the record at pages 4-6.

STATEMENT OF JURISDICTION.

(a) The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended [36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344 (a)], from a final judgment of the Supreme Court of Wisconsin entered the 10th day of June, 1947. Section 237 of the Judicial Code provides that a final judgment or decree in a suit in the highest court of a state

> "Where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

There was drawn in question in this case the validity, under Section 8 of Article 1 and the 14th Amendment of the Constitution of the United States, of Section 8.09 (x) (2) of the Beloit City Ordinances.

(b) Judgment of the Supreme Court of the State of Wisconsin was entered on June 10, 1947 (R. 26-30), and an appeal was allowed by that court to this Court on July 30, 1947.

SUPPLEMENTAL STATEMENT OF THE CASE.

The Beloit milk ordinance, which is under attack in this case, does not regulate the production of milk produced in the six mile area surrounding Beloit, unless the milk is produced for human consumption in the city (R. 13). At the time of the trial, not more than one hundred eleven farms were producing Grade A milk for consumption in the city, while three hundred nineteen farms were producing Grade B milk for use in manufactured products, such as ice cream mix (R. 11). Under Sections 97.31-97.37,

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Wisconsin Statutes, the State Department of Agriculture assumes the responsibility of protecting the purity of Grade B milk, but leaves the responsibility of regulating the production and sale of Grade A milk to the city (R. 30). The City of Beloit, therefore, exercises regulatory control over only approximately one-fourth of the milk produced in the six mile area prescribed by the ordinance. The ordinance does not prescribe any limitation upon the locations of farms producing Grade B milk, or upon the locations of the dairies or creameries receiving such milk (R. 13). Furthermore, it does not prescribe any limitations upon the locations of farms producing Grade A raw milk for consumption within the city, or upon the dairies or creameries receiving such milk, but it does regulate its production and sale (R. 13). The only geographical limitation contained in the ordinance pertains to the location of pasteurization plants (R. 22). The ordinance does not place any limitations, however, upon the locations of farms supplying milk to these plants.

The state line of Wisconsin and Illinois is the south city limits of the City of Beloit, Wisconsin. The ordinance prescribes a circle around the city with a diameter of twelve miles within which pasteurization plants furnishing milk to the city for human consumption must be located (R. 22). This area extends almost six miles into the State of Illinois. Pasteurization plants delivering milk into the City of Beloit for consumption by the residents exist in both states within the area prescribed.

SUMMARY OF ARGUMENT.

1. The requirement of the Beloit Ordinance that Pasteurization Plants must be located within a prescribed area is not a violation of the constitutional provision giving Congress the power to regulate commerce among the several states.

The purpose of the Beloit milk ordinance is to insure the purity of pasteurized milk sold in the city by periodical inspections of the farms and dairy herds supplying milk to pasteurized plants by inspections of such plants and various chemical and physical tests of the milk itself. To insure an efficient inspection service, the ordinance provides that pasteurization plants furnishing milk to the residents of the city for consumption shall be within a prescribed area.

The ordinance clause providing for such prescribed area does not affect approximately three-fourths of the milk produced in the area. Such milk is used either in the form of raw milk, or for manufacture into ice cream or other milk products. Because of the location of the City of Beloit and the costs, under competitive conditions, of doing business, pasteurization plants in any state, except Illinois, are not influenced by the ordinance. Furthermore, plants in Illinois can have no interest in the Beloit market for sale to consumers, unless they are located a short distance from the city, and no interest in selling pasteurized milk to Beloit retail stores, if they are located at any considerable distance from the city. The prescribed area extends into Illinois, and pasteurization plants in this state, but within the area, deliver milk for sale in the city.

The impact of the ordinance upon the free flow of commerce among the states is insignificant, incidental and

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non-discriminatory. It is essential to the protection of the citizens of the city against the danger of impure milk. The ordinance has a reasonable relationship to proper legislative object. It does not violate the interstate commerce clause of the United States Constitution.

2. **The provision of the Beloit ordinance providing that pasteurized milk sold within the city for human consumption be pasteurized within a prescribed area, is not in violation of the Fourteenth Amendment to the United States Constitution.**

The City of Beloit created the prescribed area upon the basis of the requirements of efficiency with a reasonable relation to the legislative purpose.

The cases cited in appellant's brief are not in point on the facts. The ordinance does not violate the Fourteenth Amendment to the United States Constitution.

ARGUMENT.

I.

The Requirement of the Beloit Ordinance That Pasteurization Plants Must Be Located Within a Prescribed Area Is Not a Violation of the Constitutional Provision Giving Congress the Power to Regulate Commerce Among the Several States.

The maintenance of a pure milk supply requires more than bacterial counts, miscroscopic examinations and other chemical and physical tests in the city where milk is sold and consumed. The United States Public Health Service Milk Ordinance, a model ordinance set forth in full in the appendix to appellant's brief on page 37, is a recognition of this obvious truth. The model ordinance provides for periodic visits to farms by health officers to grade the milk produced thereon, to inspect herds for disease, to cull diseased cows from the herds, to inspect dairy barns and cow yards, as well as the actual farm dairy operations, in order to insure the necessary degree of sanitation and cleanliness at the source of supply. The model ordinance also provides for the inspection of creameries and dairy plants. It contains many provisions designed to insure purity of milk before delivery to the city. Generally speaking, the Beloit milk ordinance contains similar provisions (R. 13).

The City Government of Beloit has the duty to insure a safe milk supply to its residents by regulation and inspection of the farms, of the dairies and at the places of sale in the city. The question is whether, in the exercise of this duty, the city has placed too great a burden upon the free flow of commerce among the states.

The area prescribed by the ordinance produces approximately three times as much milk as the residents of the

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city consume, and is shipped elsewhere (R. 11). This surplus is not subject to the ordinance clause under attack in this case. Furthermore, Grade A raw milk sold in the city for consumption is not subject to the same clause. Farms producing milk for consumption in the city may be located anywhere, in any state. The ordinance limits only the locations of pasteurization plants.

The facts in this case may be further narrowed. The City of Beloit lies about midway between the western and eastern boundaries of the state and several hundred miles from the northern boundary. No pasteurization plant located in any state, other than Illinois, can, therefore, have any interest in the Beloit market for the sale of pasteurized milk. The necessity of making long daily hauls to the homes and retail stores of the city makes the cost prohibitive under competitive conditions, and involves too costly and difficult technical problems in the preservation of a highly perishable commodity. Actually, therefore, the ordinance cannot be said to interfere in any manner or degree with the flow of milk from any state, except Illinois.

For the same reasons, the owner of an Illinois pasteurization plant situated at any considerable distance from Beloit will have no interest in entering the Beloit market for direct and daily sale. It is significant in this respect that the Dean Milk Company, which operates a pasteurization plant at a distance of thirty to thirty-five miles from the city, has made no effort to procure a license for direct sale to consumers in the city. It is equally significant that the petitioner has made no such application, but proposes merely to deliver pasteurized milk to retailers. Furthermore, the petitioner makes no showing that any pasteurization plant at any distance from the city, but lying outside the prescribed zone, has sought to sell milk directly to the consumers in the city. It is self-evident that the

ordinance places no practical restraint upon any pasteurization plant, wherever located, with respect to direct sale of pasteurized milk to consumers in the city.

It can also be said that the ordinance can have no influence upon the business of pasteurization plants selling to Beloit retail stores, unless they are situated close enough to the City of Beloit to make the daily hauls necessary to maintain such a business. So far as the record shows, the petitioner is the only one, outside the prescribed area, who has sought to enter the Beloit market. Beloit is a small city. Under these circumstances, the impact of the ordinance upon interstate commerce is so small that it is insignificant.

The ordinance in no manner sets up a preference or discrimination. It applies equally to pasteurization plants outside the prescribed area, whether those plants are in Wisconsin or any other state. It does not discriminate between plants located in Illinois, but within the prescribed area, and those located within Wisconsin. All of these plants can and do deliver pasteurized milk to the city. It treats alike all plants outside the prescribed area.

It is neither the purpose nor effect of the ordinance to prohibit interstate trade. The ordinance seeks merely to deal with an essentially local problem, with which Congress cannot deal effectively, and has not sought to deal. It affects interstate commerce incidentally. If the City of Beloit were located at some considerable distance from the Illinois-Wisconsin line, there would be no occasion to invoke the interstate commerce clause, because no dealer would have any interest in shipping pasteurized milk to the city.

If the city cannot give to its citizens the protection insured to them under the ordinance, it must fail in its

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duty to protect their health against impure milk. It is no answer to say that the city may rely upon the inspections of health officers elsewhere. While in the case at bar inspections are made by the Dean Milk Company, as well as by officials of the City of Chicago, there is no assurance that the petitioner will continue to acquire his milk from the Dean Milk Company, or that he may not acquire it from another source which is not subject to local inspection. If the petitioner is entitled to a license without complying with the clause under attack, then anyone else outside the prescribed area is also entitled to a license, no matter whether the pasteurization plant, or the farms upon which he relies for his product, are subject to inspection or not.

While admittedly a municipality cannot prohibit the importation of a lawful article of commerce from another state, as said in the case of Schollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49, where, as in this case, the impact upon interstate commerce is slight and insignificant, and the ordinance in question is reasonably adapted to the legitimate end of protecting the health of a small community, it is submitted that the city may exercise its police power, in the absence of any regulation by Congress.

The purpose of the Beloit ordinance is to protect the health and welfare of the citizens of Beloit, Wisconsin. It does not discriminate against products coming into the state in interstate commerce, and it is concerned with a problem which is predominantly local. Nebbia v. New York, 291 U. S. 502, 517, 78 L. ed. 940, 945, 54 S. Ct. 505; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560; Lemke v. Farmers Grain Co., 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244; Shafer v. Farmers Grain Co., 268 U. S. 189, 69 L. ed. 909, 45 S. Ct. 481.

A municipality may use its police power to regulate business within its own borders to the extent necessary to protect its citizens as to their health and general welfare, even though interstate commerce is affected as an incident to such regulation. Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 15 S. Ct. 154, 5 Inters. Com. Rep. 590; Hygrade Provision Co. v. Sherman, 266 U. S. 497, 69 L. ed. 402, 45 S. Ct. 141; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273; Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. ed. 1053, 53 S. Ct. 577; Mintz v. Baldwin, 289 U. S. 346, 77 L. ed. 1245, 53 S. Ct. 611. The Beloit ordinance has a real and substantial relation to the object of protecting public health. It does not invade the field in which Congress has the exclusive power to act. It seeks merely to solve a local problem.

It is submitted that, under the circumstances of this case, the provision in the Beloit ordinance for a six mile zone is not in violation of the interstate commerce clause of the United States Constitution.

II.

The Provision of the Beloit Ordinance Providing That Pasteurized Milk Sold Within the City for Human Consumption Be Pasteurized Within a Prescribed Area, Is Not in Violation of the Fourteenth Amendment to the United States Constitution.

As pointed out in the preceding section of this brief, Beloit is in the center of a great milk producing area. Production is so great that approximately three-fourths of the milk produced in the area is processed for use in manufacturing ice cream and other commodities, and is not consumed in the city itself (R. 11). Such milk is not pasteurized and, therefore, is not subject to the provision of

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the ordinance (R. 22). There are eight pasteurization plants within the prescribed area (R. 12). By far the greater part of the milk pasteurized in these plants is delivered directly to Beloit homes. A smaller part is delivered to Beloit stores for sale at retail. When and if it becomes economically profitable for another pasteurization plant to serve the residents of the city, it will find its supply of milk within the area more than adequate. There is nothing in the record to indicate that any pasteurization plant has been deprived of a business opportunity by the ordinance. There is no evidence that such a plant, outside the area, can deliver pasteurized milk directly to the consumers in the city at a profit, or that any such plant has sought to do so. The high cost of purchasing and using refrigeration trucks to haul milk directly to Beloit consumers in competition with those who use ordinary trucks because of the short distances to be traveled obviously makes such a venture unprofitable. Apparently, it is equally unattractive for a pasteurization plant outside the area to haul milk to the retail stores in Beloit. The Dean Milk Company, from which the petitioner states he will purchase milk, does not seek to do so. The petitioner himself does not operate a plant (R. 9). He proposes merely to purchase the milk and to truck it to the city for resale to local stores (R. 9).

The Beloit ordinance requires periodical inspection of both plants and farms (R. 22). If petitioner is granted the license requested, it will be necessary for the city to make periodical inspections of an additional plant and approximately one hundred ninety-seven (197) additional farms (R. 8). This will require the employment by the city of an additional inspector at a cost to the city of about $200.00 per month plus traveling expenses (R. 13). It is not a valid answer to this argument that if one more pasteurization plant were to be located within the prescribed area, an additional inspector would be necessary, in any

event. The present plants fully supply the demand, and there is no reason to believe that any plant will be added to the present number in the foreseeable future.

There is no assurance that the petitioner, once granted a license, may not purchase milk from a different plant and from a greater distance. Furthermore, if the ordinance is not valid, some other dealer may wish to enter the Beloit market, and thus compel city inspection of many more farms, lying at unknown distances and in different directions from the city. On the basis of the record in this case, it can fairly be said that the ordinance imposes no restriction upon any dealer in pasteurized milk, except the small jobber who buys and hauls milk to the retail stores of the city. If the city is to be compelled to open its doors to every such dealer, no matter from whom he purchases, or at what distance, there will be an inevitable breakdown in the inspection service which the municipality has a duty to render to its citizens.

The Supreme Court of Minnesota, in the case of State ex rel. Larson v. City of Minneapolis (1933), 190 Minn. 138, 251 N. W. 121, said with reference to the constitutionality of a milk ordinance, quoting with approval from the trial court:

> ". . . It is obvious that adequate inspection is a reasonable precaution. It is obvious that consideration of convenience, efficiency and cost of inspection are proper to be taken into account in determining the question of reasonableness. It is also obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly, and too likely to be ineffective to be practicable. It seems to me there can be no doubt of the right of the city council to fix a reasonable limit beyond which it will not provide for inspection, and beyond which, for that reason, pasteurization plants will not be licensed. . . ."

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A reasonable exercise of the police power does not create a trade barrier. The Beloit ordinance, in light of the attending circumstances, is reasonable, not arbitrary. It contains many clauses designed and enacted to protect the health of the people against dangers and disease resulting from impurities in milk. These clauses will be unavailing unless there can be an efficient enforcement of them. When their enforcement becomes difficult and too costly, laxity, if not failure, will follow, and the people of the city will not have the protection which the city owes to them in the interest of community health.

The case of State ex rel. Larson v. City of Minneapolis, supra, cited by the appellant, is not in point. In this case a city ordinance of Minneapolis provided that no license should be issued to a pasteurization plant located outside the city after December 31, 1932. At the time of the passage of the ordinance, Larson maintained a pasteurization plant at Cologne, Minnesota. The Minneapolis ordinance provided merely for the inspection of pasteurization plants, and did not provide for the inspection of farms delivering milk to such plants. The Supreme Court of Minnesota recognized that consideration of efficiency, convenience and cost of inspection are proper to be taken into account in determining the question of the reasonableness of such an ordinance. The court stated that it is obvious that there is somewhere a limit of distance beyond which inspection by the city's agents would be too inconvenient, too costly and too likely to be ineffective to be practicable. It concluded, however, that in the particular case the additional cost of inspection was not so great as to justify the prohibition. In the case at bar, the ordinance under consideration requires not merely the inspection of pasteurization plants, but also the inspection of farms servicing said plants. As stated above, it will be necessary, if a license is granted to the petitioner, for the City of Beloit

to employ an extra man, at a cost ranging up to $3,000.00 a year.

The case of Sheffield Farms Co., Inc., v. Seaman, 114 N. J. L. 455, 177 A. 372, is likewise not in point. In this case the ordinance of Perth Amboy, New Jersey, did not provide for any limits upon the location of pasteurization plants, but the City Health Department sought to exercise a discretion in refusing to grant the petitioner a license upon the ground that it had insufficient personnel to make the additional inspections. The petitioner had a license to sell and deliver milk in all of New Jersey. The Court held that under the ordinance no discretion in granting or refusing to grant a license was vested in the Health Department. The court also pointed out that the Legislature of New Jersey, by state law, had provided for additional funds. The court also came to the conclusion that the city had taken the position that it had enough milk dealers, and that such an attitude was arbitrary and capricious.

In the case of LaFranchi v. City of Santa Rosa, 8 Cal. (2d) 331, 65 P. (2d) 1301, the milk ordinance under consideration provided merely that it was unlawful for any person to sell milk within the City of Santa Rosa for human consumption unless it was pasteurized in the city. Plaintiff's pasteurization plant was located about five miles outside the city. The ordinance did not provide for the inspection of farms delivering milk to the city. In addition, the City Health Inspector of Santa Rosa did, in fact, inspect the plaintiff's raw milk plant, and as an employee of a nearby city also inspected the plaintiff's pasteurization plant. The fees paid by milk dealers in Santa Rosa were ample to cover the cost of inspection of the additional pasteurization plant, and, in fact, no additional inspection was required. Under these circumstances, the California Court quite properly held that the

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prohibition had no relation to any legislative purpose, and that the ordinance erected a trade barrier.

The cases of Meridian v. Sippy, 54 Cal. App. (2d) 214, 128 P. (2d) 884; Grant v. Leavell, 259 Ky. 267, 82 S. W. (2d) 283, and Prescott v. City of Borger (Tex. App.), 158 S. W. (2d) 578, all deal with ordinances whose obvious purposes were to create trade barriers. If the purpose or effect of an ordinance is to erect a trade barrier, or if a regulation had no reasonable relation to a proper legislative purpose, it is, of course, invalid as a violation of the Fourteenth Amendment. If, however, an ordinance does not go beyond the reasonable demands of the occasion, and tends to accomplish the purpose of protecting the welfare and health of the people, it is not unreasonable and oppressive, and the courts will not interfere. All municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such an ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance, in the light of this knowledge, creates a prima facie presumption that it is reasonable. 3 McQuillen Mun. Corp. (2d ed.), p. 110, Sec. 951.

Each case must be judged on its own facts and not upon the basis of general statements of principles. In the case at bar, the City of Beloit passed an ordinance which in no manner limits the activity of any pasteurization plant which can conceivably seek a Beloit market. It affects adversely only the lone operator who may purchase his milk at far distant points and bring it to Beloit by truck. The city, however, has the obligation to protect its citizens against the danger of impure milk, no matter how small the quantity. It has the obligation to inspect the sources

of milk supply, no matter how far distant from the city they may be. There is a limitation beyond which the city should not be compelled to go. If the appellant is entitled to receive a license, then any similar operator, even though he may purchase his milk at a creamery 100 miles from Beloit, drawing milk from farms located a similar distance, is entitled to receive a license. A realistic approach to the problem requires a prohibition such as is contained in the Beloit ordinance. For this reason, we submit that the ordinance should be considered a legitimate exercise of legislative power.

In the case of Nebbia v. New York, 291 U. S. 502, 517, 78 L. ed. 940, 945, 54 S. Ct. 505, the court said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' Northern Securities Co. v. United States, 193 U. S. 197, 337, 338, 48 L. ed. 679, 700, 701, 24 S. Ct. 436. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts

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are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

We submit that the provision of the Beloit milk ordinance, requiring that milk sold within the city, for human consumption, shall be pasteurized in plants within a prescribed zone, is not in violation of the interstate commerce clause of the Fourteenth Amendment to the Constitution of the United States, and that the judgment of the Supreme Court of the State of Wisconsin should be affirmed.

Respectfully submitted,

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